

FILED

2010 SEP 17 PM 1 33

IN THE UNITED STATES DISTRICT COURT

PATRICK E. DUFFY, CLERK

BY

DEPUTY CLERK

FOR THE DISTRICT OF MONTANA

BILLINGS DIVISION

UNITED STATES OF AMERICA,

Cause No. CR 08-004-BLG-RFC

CV 10-108-BLG-RFC

Plaintiff/Respondent,

vs.

ORDER DISMISSING MOTION
AND DENYING CERTIFICATE
OF APPEALABILITY

JESSE LEE VARDARO,

Defendant/Movant.

On September 7, 2010, Defendant/Movant Jesse Vardaro, a federal prisoner proceeding pro se, filed a motion to vacate, set aside, or correct his sentence, pursuant to 28 U.S.C. § 2255.

District courts do not consider § 2255 motions while a direct appeal is pending. Feldman v. Henman, 815 F.2d 1318, 1320 (9th Cir. 1987) (as amended); United States v. Deeb, 944 F.2d 545, 548 (9th Cir. 1991); Rule 5, Rules Governing Section 2255 Proceedings for the United States District Courts, advisory committee's note (quoting Womack v. United States, 395 F.2d 630, 631 (D.C. Cir. 1968)). Although the Ninth Circuit Court of Appeals issued its decision on August 2, 2010, Vardaro's

ORDER DISMISSING MOTION AND DENYING
CERTIFICATE OF APPEALABILITY / PAGE 1

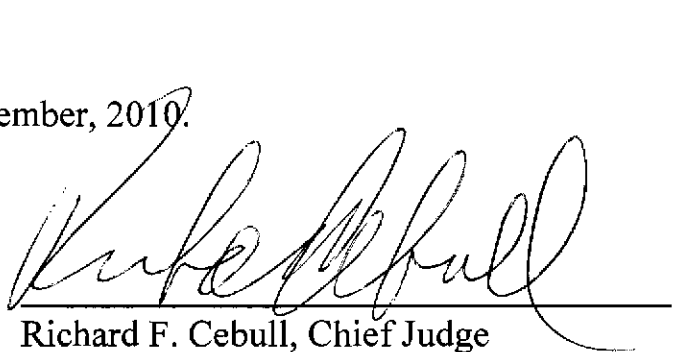
conviction is not yet final because his time to file a petition for writ of certiorari in the United States Supreme Court has not expired. Clay v. United States, 537 U.S. 522, 532 (2003). Dismissal of his motion at this time will not preclude him from filing a § 2255 motion in the future. Slack v. McDaniel, 529 U.S. 473, 485-86 (2000).

This is well-settled law. A certificate of appealability is not warranted. Lozada v. Deeds, 498 U.S. 430, 432 (1991) (quoting Barefoot v. Estelle, 463 U.S. 880, 893 n.4 (1983)); Slack, 529 U.S. at 484.

Accordingly, IT IS HEREBY ORDERED as follows:

1. Vardaro's motion to vacate, set aside, or correct the sentence (doc. 106) is DISMISSED WITHOUT PREJUDICE as premature.
2. A certificate of appealability is DENIED.
3. The Clerk of Court shall enter a judgment of dismissal in Cause No. CV 10-108-BLG-RFC.

DATED this 12 day of September, 2010.


Richard F. Cebull, Chief Judge
United States District Court